IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 380 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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NATHA BAVA TARACHANDNATH ZAVERNATH GURUVENATH - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR JITENDRA MALKAN for Appellant(s) : 1,
MR KT DAVE, Additional Public Prosecutor for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 22/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The appellant – original accused, namely, Nathabava Tarachand Zaverchand Guru Devnath, has filed this Criminal Appeal under Section-374 of the Criminal Procedure Code against the order and judgment of the learned Additional Sessions Judge, Junagadh dated 27.2.2002 in Sessions Case No.105 of 1996 convicting him under Section-363-A(1) of IPC and sentencing him for R.I of 3 years with fine of Rs.500/- and in default thereof, to undergo, S.I of one month.

2. The appeal was admitted by this Court on 4.4.2002. However, at the time of admission of appeal this Court has issued suo-motto notice to the appellant – original accused to show cause as to why sentence imposed on him

by the learned Additional Sessions Judge, Junagadh should not be enhanced. The Court has also granted regular bail to the appellant – original accused pending the hearing and final disposal of this appeal, on his furnishing solvent surety of Rs.10,000/- with personal bond of like amount and on usual terms and conditions and on further condition that the appellant – original accused shall not leave State of Gujarat without the prior permission of this Court. The Court has also clarified that the payment of fine was the condition precedent and if fine was not paid the appellant – original accused would not be released on bail.

3. The case of the prosecution as revealed from the complaint and as unfolded during the course of trial is as under :-

4. That the complainant, namely, Haribhai

Karamshibhai Vachhani – original resident of Kutch, Taluka – Nakhatrana, Village – Navawas and residing on the date of filing of the complaint at Shiv Timber Mart, Shapur Road, Mangrol, has stated in his complaint that he, his brother – Chandubhai, his brother-in-law – Haribhai (sister's husband) and other family members were present in the house at about 9 o'clock in the night of 1st December, 1995. At that time his daughter, namely, Geeta aged about 10 years took her younger brother aged about 3 years out for passing a natural call (latrine) near the gate of his Timber Mart. In the meantime, daughter Geeta started shouting so he and his brother Chandu and brother-in-law Haribhai came out from his house and they show his daughter Geeta frightened and she was crying. She told them that one Sadhu was kidnapping Dharmendra and has gone towards the street nearby. On hearing this, the complainant and his brother Chandu and brother-in-law Haribhai

went towards the street. A Sadhu having beard in white dress was found to carry his son Dharmendra, in the light of the moon. So they shouted. He, therefore, put down Dharmendra, who started crying. In the meantime, Kheta Soma Solanki of his neighbourhood rushed there. The complainant's brother Chandu took his son Dharmendra in his hand.

5. The complainant, brother-in-law – Haribhai and Khetabhai, have caught the said white dressed Sadhu with beard and have brought him to the Police Station. Upon asking his name and address he stated his name to be Nathabava Tarachandnath Javernath Gurudevnath residing at Natwarnagar Plot, Bagasara Bhayani.

6. On the basis of this complaint Mangrol Police Station Officer registered First Information Report being FIR No.I-149 of 1995

of the offence punishable under Section-363-A of the IPC. The Investigating Officer arrested the appellant – original accused and submitted him to the judicial custody.

7. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded, and since sufficient incriminating evidence was found against the appellant – original accused, he was charge-sheeted in the Court of learned Judicial Magistrate First Class. As the offence punishable under Section 363-A(1) of IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate committed the case to the Sessions Court, Junagadh.

8. The learned Additional Sessions Judge, Junagadh, to whom the case was made over for trial, framed charge against the accused. The

accused pleaded not guilty to the charge and claimed to be tried. Thereupon he was put to trial and tried by the learned Additional Sessions Judge, Junagadh, in Sessions Case No.105 of 1996.

9. To prove the culpability of the accused, the prosecution has examined as many as 8 witnesses and relied upon their oral testimony, details of which are given as under:-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	7	P.W. 1 – Haribhai Karamshibhai	12-13
02.	9	P.W. 2 – Geeta Haribhai	17-18
03.	10	P.W. 3 – Chandubhai Karamshibhai	19-20
04.	11	P.W. 4 – Khetabhai Somabhai	21-22
05.	12	P.W. 5 – Vakmabhai Devabhai	23-24
06.	14	P.W. 6 – Ramesh Ramjani	27-28
07.	15	P.W. 7 – Parsotambhai Gopalbhai	29-31
08.	17	P.W. 8 – Punjabhai Rajbhai	32-33

10. To prove the charge levelled against the

accused, the prosecution has also produced number of documents and relied upon the contents of the same, details of which are given as under:-

Sr. No.	Exh. No.	Type of Evidence	Page Nos.
01.	8	F.I.R	14-16
02.	13	Panchnama	25-26
03.	16	Panchnama	30-31
04.	19	Entry No.18 from Mangrol Police Station diary.	35

11. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement the accused denied the case of the prosecution in toto and stated that he has been roped in the false case under Section 363-A(1) of IPC.

12. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the learned Additional Sessions Judge, Junagadh has held that the accused has committed an offence under Section 363-A(1) of IPC and awarded the sentence of R.I of 3 years with fine of Rs.500/- and in default thereof to undergo S.I of 1 month. It is this judgment and order, which is now on anvil of scrutiny of this Court in this Appeal, filed at the instance of the accused.

13. Mr.Jitendra Malkan, learned advocate appearing for the appellant – original accused has submitted that the impugned judgment and order passed by the learned Additional Sessions Judge, Junagadh is against the law, equity and principle of natural justice. He has further submitted that the learned Additional Sessions Judge, Junagadh has erred in ignoring the fact

admitted by the prosecution witness, Geeta that she started shouting out of fear on appearance of a “Bava” with beard in dark. He has further submitted that the fact about lifting Dharmendra has not been proved by the prosecution beyond any reasonable doubt. Such specific question in cross-examination was unwarranted in light of the unequivocal version of the witness, Geeta. He has further submitted that the prosecution witness P.W No.2 - Geeta might have added, out of fear, her own version at the time of narrating the whole incident. He has, therefore, submitted that the learned Additional Sessions Judge, has seriously erred in convicting the appellant – original accused solely on the evidence of P.W.No.2 – Geeta. Mr.Malkan further submitted that the appellant – original accused has not committed any offence under Section 363-A(1) of the Act. At the most it was merely an attempt to kidnap the child - Dharmendra for

which the charge under Section 363-A could not have been framed against the appellant – original accused. He, therefore, urges to allow the appeal by quashing the order of conviction and sentence.

14. Mr. K.T.Dave, leaned APP for the respondent – State of Gujarat has fairly submitted that, it is true that the offence of kidnapping or maims any minor for the purpose of begging has not been concluded. It is merely an attempt to commit kidnapping and, therefore, the accused ought to have been charged for the offence punishable under Section-363 read with Section-511 of the IPC. He has, therefore, submitted that the impugned judgment and order convicting the appellant – original accused under Section 363-A(1) deserves to be quashed and set aside by modifying the order of conviction and sentence under Section-363 read with Section-511 of IPC and, therefore, the appellant –

original accused has rightly been awarded sentence of R.I of 3 years by the learned Additional Sessions Judge, Junagadh which cannot be interfered with by this Court.

15. We have considered the submissions advanced by Mr. Jitendra Malkan, learned advocate appearing for the appellant – original accused and Mr. K.T.Dave, learned APP for the respondent - State of Gujarat. We have also perused the impugned judgment and order. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

16. After threadbare examination of the evidence of the prosecution witnesses, on reappreciation, reanalysis, reevaluation, and close scrutiny of the evidence, the undisputed facts which have come on record in

the form of evidence and the salient features of the prosecution case, are now as under:-

(i) The alleged incident took place at about 9:00 o'clock on 1.12.1995 near the gate of Timber Mart of the complainant at Shapur Road, Mangrol.

(ii) P.W. No.2 – Geeta took her brother Dharmendra, aged about 3 years for passing the natural call near the gate of her Timber Mart.

(iii) She saw a Sadhu having beard kidnapping her brother Dharmendra and hence she started shouting.

(iv) On hearing shouts of P.W.No.2 – Geeta, the complainant, his brother – Chandubhai and brother-in-law – Haribhai came out from their house and went towards the street. They found Sadhu having beard in white dress.

(v) Since the complainant and other persons have rushed towards the street, the Sadhu put down the child - Dharmendra.

(vi) P.W.No.1 – Haribhai in his deposition has stated that he saw Sadhu running towards Varanda. He has also admitted in his deposition that he and other persons, who were with him have caught Sadhu from the Varanda.

(vii) P.W. No.2- Geeta has stated in her deposition that Sadhu has lifted his brother - Dharmendra, and she started shouting. Her father, uncle and other persons have come out from the house and, therefore, the Sadhu has put down Dharmendra from his hands and run away.

(viii) P.W. No.3 – Chandubhai has stated in his deposition that he heard the shouts of

Geeta and came out from the house and he ran after that Sadhu. He also admitted that he alongwith others have taken Sadhu to the Police Station.

(ix) P.W. No.4 – Khetabhai and P.W. No.5 – Vakmabhai have also supported the case of the prosecution.

(x) Panchas have also admitted the fact stated in the panchnama and supported the case of the prosecution.

17. In light of the aforesaid undisputed facts, the question which calls for determination of this Court in this appeal is as to whether the prosecution has successfully established that the accused has committed offence punishable under Section 363-A(1) of IPC. It is true that from the evidence of P.W. No.2 – Geeta it is proved that the appellant – original accused has

lifted the child – Dharmendra but he has not kidnapped him. It is merely an attempt to kidnap. So far as an act of kidnapping is concerned, it is not concluded. The victim - Dharmendra was not kidnapped or abducted by the appellant – original accused. It is not even proved by the prosecution that the victim - Dharmendra was kidnapped by the appellant – original accused for the activity of begging and begging was actually done by him.

18. Section-363-A(1) stipulates that whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. From the evidence of none of the witnesses, it is proved beyond reasonable

doubt that the appellant – original accused has actually kidnapped the victim – Dharmendra or got any activity of begging done from him.

19. Section-363 of IPC deals with punishment for kidnapping. It says whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. In the present case even actual kidnapping has not taken place and hence Section-511 is required to be brought into picture, which says that person attempting to commit offence punishable with imprisonment for life or imprisonment. It can, therefore, be said that the appellant – original accused has made an attempt to kidnap the victim – Dharmendra.

20. In view of the aforesaid evidence,

according to this Court, conviction recorded under Section 363-A of IPC against the appellant – original accused does not stand to scrutiny of this Court as it is merely an attempt to kidnap. Therefore, according to us, the accused is required to be convicted under Section 363 read with Section-511 of IPC.

21. A question arose before the Hon'ble Supreme Court in the case of Sukhwinder Singh v. State of Punjab, AIR 1994 SC 764, wherein Section-511 of the Code was pressed into service. In paragraph 5 of the said judgment, the Hon'ble Supreme Court has observed as under;

"5. Coming to the question of sentence we find that ultimately neither of the two witnesses were injured nor the appellant succeeded in taking any money from them. No doubt the demand made by them is an offence

in the eye of law and attract the provisions of law with which they are charged. An offence u/S. 397 simpliciter is not made out and as the learned counsel rightly pointed out it would be only one punishable u/S. 397 read with S.511, IPC. We are also of the view that u/S.3 of TADA Act the sentence of 10 years is uncalled for and a minimum sentence of 5 years would meet the ends of justice."

22. The principle enunciated by the Hon'ble Supreme Court in above referred to judgment is squarely applicable to the facts of the instant case. In the instant case also an attempt was made to kidnap the victim – Dharmendra. However, the actual kidnapping was not taken place and nor any begging activity was done by the victim – Dharmendra. An attempt to commit kidnapping was made which is punishable under Section-363 read with Section-511 of IPC. Therefore, the

appellant – original accused is required to be held guilty for the offence punishable under Section-363 read with Section-511 of IPC instead of Section-363-A(1) of IPC.

23. When the principal offence is read with Section 511 the accused can be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. In the present case, so far as punishment under Section 363 of IPC is concerned, the accused can be punished to suffer RI which shall be upto 7 years. However, as observed earlier, the offence has not been concluded, therefore, according to us, sentence of 3 years for commission of offences punishable under Section 363 read with Section 511 IPC would serve the ends of

justice.

24. For the foregoing reasons, since the learned Additional Sessions Judge, Junagadh has awarded sentence of 3 years, we do not see any justification to interfere in the said order. The order of conviction recorded against the appellant – original accused for the offence punishable under Section-363-A is quashed and set aside by modifying the same and it is held that the accused is guilty for the offence punishable under Section-363 read with Section-511 of IPC. We, accordingly, convict the accused for commission of the offenes punishable under Section 363 read with Section 511 IPC. Since the sentence awarded to him is of 3 years which is less than half of the sentence awarded, the appellant – original accused is rightly sentenced to suffer R.I of 3 years and fine of Rs.500/- and in default thereof, to undergo, S.I of 1 month.

25. In view of the aforesaid discussion and finding arrived at by us, no enhancement in the sentence awarded by the trial Court is warranted and hence the suo-motto notice of enhancement issued by this Court on 4.4.2002 is hereby discharged.

26. Accordingly, Criminal Appeal No.380 of 2002 is hereby dismissed and notice of enhancement issued earlier is discharged. The bail bond furnished by the appellant – original accused stands cancelled. The appellant – original accused is hereby granted 4 weeks time to surrender himself to the jail authority.

27. This appeal is accordingly disposed off.

(A. M. KAPADIA, J.)

(K.A. PUJ, J.)

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